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IN THE

Supreme Court of the United States

OCTOBER TERM — 1956

No. 102

UNITED STATES OF AMERICA,

Petitioner,

v.

C. M. DOW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE 5TH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OCTOBER TERM — 1956

No. 904

UNITED STATES OF AMERICA,

Petitioner,

v.

C. M. DOW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE 5TH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

May It Please The Court:

STATEMENT

Petitioner's statement, although argumentative in nature, is substantially correct. This is a condemnation suit in which the 5th Circuit Court of Appeals held that Respondent, C. M. Dow, as the land owner when a declaration of taking was filed and the United States acquired title to a perpetual right of way easement across certain property, was the owner entitled to just compensation for the land condemned, rather than the former owners who had title to the property when the government entered into possession.

SUMMARY OF ARGUMENT

I. No grounds for review are shown by petitioner.

II. The Court below correctly decided that respondent, as the owner when the United States first became bound to take the property, was the proper person to receive just compensation.

ARGUMENT

I.

No grounds for review are shown by petitioner.

Petitioner has wholly failed to bring its application for Certiorari within the purview of Rule 19 of the Supreme Court Rules. No conflict of decision between the 5th Circuit and another Court of Appeals was spelled out or even alluded to;[1] no conflict with applicable decisions of this Honorable Court; not even that this is a case of first impression of an important Federal question could be urged by petitioner. Indeed, in seeking a review, petitioner can only quarrel with the plain language of the condemnation statute followed by the government in acquiring the property in question and urge inconvenience to the executive branch as the true grounds for review.

The 5th Circuit Court of Appeals simply construed the Declaration of Taking Act (40 U.S.C.A. Sec. 258) that ". . . upon the filing of said declaration of taking . . . *the right to just compensation for the same shall vest* . . ." to mean what it says and held that respondent, C. M. Dow,

[1] Petitioner does urge that a conflict "in principle" exists between this decision and earlier 5th Circuit decisions to the effect that the time of valuation of property condemned is the time of entry into possession rather than the time title is acquired. e.g., *Anderson* v. *United States* (C.A. 5) 179 F. (2d) 281. However, the court below distinguished these cases upon the ground that an equitable rule for computation of damages should not be used to determine ownership of property. Furthermore, Rule 19 does not contemplate review upon intra-Circuit conflict, even if any such conflict existed (which it does not).

the owner of the land at the time when the declaration of taking was filed in this case and the time of *vesting of the claim* was the owner entitled to just compensation for the land condemned, rather than earlier owners of said land. The court held, on this point:

> "The Declaration of Taking Act fixed a definite time of taking *and of accrual of the claim for compensation* and removed much of the uncertainty theretofore existing . . ."

And, again, the court below held:

> ". . . Upon the filing of the Declaration of Taking the United States became irrevocably committed to the payment of the ultimate award. The Government then took title to the easement, whereupon the claim for compensation arose and vested in the owner, Dow."

In asking this Honorable Court to review this decision, petitioner not only can point to no conflict of decision, but also is forced to attack the very condemnation statute it chose to proceed under to acquire the land in question (R. 23), and to demand that this Honorable Court ignore or delete by construction the plain language of the Act as to when a claim against the United States vests in the owner.

Addressing itself to this Court (rather than to the Congress, for remedial legislation), petitioner urges that such relief is required by reason of certain procedures adopted by the executive arm of the Government in condemnation cases and the possibility of some disruption thereof — a disruption, however, not borne out by the record in this case. The Federal Government's impatience with a controlling statute provides small ground for invoking the jurisdiction of this Honorable Court; particularly is this true where, as here, the constitutional rights of a land owner to receive just compensation are to be weighed in the balance.

II.

The court below correctly decided that respondent, as the owner when the United States first became bound to take the property, was the proper person to receive just compensation.

Petitioner states that physical occupation of property by a Federal Officer ". . . constitutes a taking (for which) . . . the owner is provided an adequate remedy to obtain compensation . . ." (Brief for petitioner, page 6). In so stating, petitioner ignores settled Federal condemnation law that the United States are ". . . free to abandon the condemnation proceeding at any time before payment of the award and transfer of title, that they take (took) no title until payment, that the possession of the land by the United States does (did) not make these rules inapplicable . . ." *Moody* v. *Wickard*, 78 U.S. App. D. C. 80, 136 F. (2d) 801, 803, 804, certiorari denied, 320 U.S. 775. Land owners claiming that the right to just compensation accrues from physical occupation of their land by the United States have repeatedly been denied recovery. *O'Conner* v. *United States* (C.A. 9, 1946) 155 F. (2d) 425; *U. S.* v. *One Parcel of Land* (D.C., Dist. Col., 1955), 131 F.S. 443, and the many cases therein cited.

Petitioner does not suggest that a wrong result was reached in these cases and that physical occupation alone should irrevocably bind the government to take and pay for property (Cf. Brief for Petitioner, pages 16, 19). Instead, Petitioner's argument appears to be that the land owner loses his land and acquires only an unenforceable "claim" against the government when possession is taken—a "claim" which the government remains free to accept or reject. This unabashed argument, it is submitted, places a very high premium on the convenience of the government, and a very

low value on the property rights of the citizen. Such argument wholly fails to take into account the condemnation rules laid down in the decisions of this Honorable Court.

In *Danforth* v. *United States*, 308 U.S. 270, the Court recognized the rule to be that (1) no "taking" occurs until the condemnor's right to discontinue or abandon the property has ceased and (2) that it is the owner at the time the condemnor becomes *bound* to take the property, not an earlier or later owner, who is entitled to payment. The court held, in the *Danforth* case (308 U.S. at pages 283-284):

> "For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment. . . . Until taking, the condemnor may discontinue or abandon his effort."

From *Cherokee Nation* v. *Southern Kansas Railway Company*, 135 U.S. 641, to *United States* v. *Dickinson*, 331 U.S. 745, this Honorable Court has consistently held that a "taking" giving rise to the right to just compensation occurs upon the passage of *title* to (and not merely possession of) land being condemned. Thus, in the *Cherokee Nation* case, *supra*, the Court stated (135 U.S. 641 at page 659):

> "Within the meaning of the constitution, the property, *although entered upon pending the appeal, is not taken until compensation is ascertained in some legal mode, and, being paid, the title passes from the owner.*"

In the *Dickinson* case, *supra*, in determining the question of when a cause of action against the Government arose for the taking of lands flooded by a Government dam, the Court expressed the same view in the following language (331 U.S. 745, at page 748):

"Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' — when they are born, whether they proliferate; and when they die."

In the *Dickinson* case, *supra* (as here) one who purchased the land following some "physical occupation" of the land (by flooding) was nevertheless held to be the owner entitled to just compensation. This Honorable Court's ruling in that case was made despite the Government's similar claim that the result in the case could lead only to "demonstrably unsound alternatives". An earlier "taking" was there urged by the Government (as here) so as to make applicable the Anti-Assignment Statute (31 U.S.C. 203). This contention of the Government was overruled. The Government there contended (as here) to no avail that the respondent in that case purchased not land, but a prohibited claim against the Government. The principle upon which the case turned — that property is taken in the constitutional sense only when title passes — has direct application in our present case. As the owner when title to the property passed to the Government, respondent, C. M. Dow, under the constitution, was the owner at the time of the "taking" who was entitled to be paid for the easement then and thereby condemned.

CONCLUSION

In view of the plain language of the Declaration of Taking Act that the claim against the Government vests when the Declaration of Taking is filed, and not before, and in view of the repeated decisions of this Honorable Court that a taking, in the constitutional sense, occurs when the con-

demnor *must* take and pay for the property and when title passes (*Danforth* v. *United States*, 308 U.S. 271), it would seem clear that any claimed inconvenience to the executive branch is beside the point and that the correct result was reached in the court below.

It is, accordingly, respectfully submitted that petitioner's Application for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the above and foregoing brief in opposition have been mailed to J. Lee Rankin, Solicitor General, Perry W. Morton, Assistant Attorney General, and Roger P. Marquis, Attorney, Justice Department, Attorneys for the United States, this 8th day of May, A.D. 1957.

L. Keith Simmer

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